PUBLIC PROSECUTOR v. AMAT BIN ALI & ANOR.

[A. Cr. J. (Wilson J.) January 29, 1955]

[K. L. — Criminal Appeal No. 99 of 1954]

Penal Code, ss. 378 and 381 — Ingredients of offence of theft — Statement made to a person who is not a member of the police force — Admissibility — Evidence Ordinance, 1950, s. 24.

In this case the learned Magistrate at the trial acquitted the second accused on a charge of theft of petrol. In his grounds of judgment the learned Magistrate said: "The prosecution sought to put in a statement by accused 2 but the Court rejected it on the ground that the person who recorded the statement (P.W. 2) was not a fit and proper person to do it. P.W. 2 was the Fuelling Superintendent who supervised the discharge of the fuel from the tanker to the storage tank."

There was no suggestion that the statement in this case was caused by any inducement, threat or promise.

Held: the learned Magistrate was wrong in rejecting the statement, as statements, even though they are confessions, made to a person who is not a member of the police force, are only inadmissible under s. 24 of the Evidence Ordinance if they had been caused by any inducement, threat or promise.

MAGISTRATE'S CRIMINAL APPEAL.

E. Brown (Federal Counsel) for the appellant.

Respondents in person.

Wilson J. : — The two accused were charged with committing theft of 141 gallons of aviation gasolene or, in the alternative, committing criminal breach of trust in respect of the same. The first accused pleaded guilty in the first instance to a charge under section 381 of the Penal Code, i.e. theft by a servant of property in the possession of his master. The learned Magistrate, having heard the evidence against the second accused, amended the charge against the first accused to one under section 511 and section 408 of the Penal Code. The accused then pleaded guilty to that charge and was convicted. He was bound over under section 294 of the Criminal Procedure Code for 12 months.

The second accused brought petrol in a tanker from Port Swettenham to Kuala Lumpur aerodrome. All the petrol should have been discharged at the aerodrome but in point of fact one compartment was not discharged, and whether or not the first accused was aware of that, the fact remains that instead of driving straight back to Port Swettenham he drove the tanker to Serdang which was quite out of his way and was caught trying to dispose of it at the petrol station there. That he had not disposed of it is immaterial. The fact remained that at some stage or another he became aware of the fact that there was still petrol in the tanker and he must have intended, when he went to Serdang, to take it dishonestly out of the possession of his employer and removed it with that intention. That amounts to theft according to the definition contained in section 378 of the Penal Code. I therefore, altered the conviction against the first accused to one of theft contrary to section 381 of the Penal Code. The sentence appears to me to be quite inadequate for an offence of this nature and I accordingly altered it to one of 6 months' imprisonment to date from the 28th January, 1955.

The second accused was acquitted on the ground that the evidence disclosed no evidence at all against him. I find this a little difficult to understand as on the evidence he was undoubtedly the person who was responsible for one of the compartments of the tanker not being emptied at the aerodrome. This is a fact and it is immaterial whether those persons who were superintending the discharge of the petrol were guilty of negligence or not. The Magistrate, however, makes this comment in his grounds of judgment :—

"The prosecution sought to put in a statement made by accused 2 but the Court rejected it on the ground that the person who recorded the statement (P.W. 2) was not a fit and proper person to do it. P.W. 2 was the Fuelling Superintendent who supervised the discharge of the fuel from the tanker to the Storage Tank."

I am quite unable to understand the suggestion that this person was not a fit and proper person to take a statement from the accused. It would appear from the record that Mr. Rajasooria, who objected to the admission of the statement, gave no grounds for his objection. But whether or not this statement amounted to a confession, there is nothing in the record to show why evidence of it should be inadmissible. The statements of accused persons, even though they amounted to a confession, are admissible in evidence provided they are not made inadmissible by some statutory provision. So far as statements made, even though they be confessions, to a person who is not a member of the police force are concerned, they are only inadmissible under section 24 of the Evidence Ordinance if they had been caused by any inducement, threat or promise. No suggestion was made that the statement was so induced, and the learned Magistrate did not examine the second witness, Mr. De Cota, on this point although he asked certain questions of the first witness who did not take the statement. No evidence is recorded that the statement was induced by threat or promise, either in reply to the learned Magistrate or to Counsel for the defence.

So far as the second accused is concerned, I ordered the case to be remitted to the Magistrate for the taking of the evidence of the statement by the second accused to Mr. De Cota, unless it can be shown that it is

inadmissible under Section 24 of the Evidence Ordinance. I therefore ordered the learned Magistrate to take further evidence and thereafter to give judgment according to law.

Order accordingly.

SULTAN BIN RAHMANSA v. REGINA

[A. Cr. J. (Spenser Wilkinson J.) March 22, 1955]
[Penang — Criminal Appeal No. 1 of 1955]

Courts Ordinance, 1948, s. 85 — Transfer of a case from Magistrate's Court to Sessions Court — Whether Magistrate can transfer a case after he has found the accused guilty — Criminal Procedure Code (Cap. 21) s. 294.

In this case the appellant was charged with voluntarily causing hurt to one Puteh binti Abdul Kadir with a dangerous weapon contrary to s. 324 of the Penal Code. The learned Magistrate after hearing the evidence for the prosecution and the defence recorded that he was satisfied that the appellant had attacked the complainant and had struck her with the weapon. He then expressed the opinion that the Court had no sufficient power to deal with the case adequately and transferred the case for trial before the Sessions Court. Subsequently the case was retried before the Sessions Court and the appellant was convicted and sentenced to six months' imprisonment.

Held: (1) the power given to a Magistrate's Court by the proviso to s. 85 of the Courts Ordinance, 1948, must be exercised, if it is exercised at all, before the Magistrate has come to a conclusion upon the guilt or otherwise of the accused and therefore the learned Magistrate in this case was wrong in transferring the case to the Sessions Court; (2) the trial before the Sessions Court in this case was irregular, as the appellant had already been tried by the Magistrate.

Case referred to:—

(1) *Public Prosecutor v. Viran* (1947) M.L.J. 62 p. 65; (1946) M.U.L.R. 61 p. 67.

MAGISTRATE'S CRIMINAL APPEAL.

Jag-Jit Singh for the appellant.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Spenser Wilkinson J.: — The appellant was tried before the Magistrate's Court upon a charge of voluntarily causing hurt to one Puteh binti Abdul Kadir with a dangerous weapon contrary to Section 324 of the Penal Code. After hearing the whole of the evidence for the prosecution and the defence the learned Magistrate recorded that he was satisfied that the accused had attacked the complainant and had struck her with a weapon which produced the wound described by the Medical Officer. He then expressed the opinion that the Court had no sufficient power to deal with the case adequately and transferred the case for trial by the Sessions Court.

The learned President of the Sessions Court retried the case and at the conclusion of the evidence before him he convicted the appellant and sentenced him to six months' imprisonment.

In my opinion the learned Magistrate had no power to transfer the case as he did to the Sessions Court and the Sessions Court had no power to retry the case. It is well established that a Magistrate's Court has no power to transfer a case to a higher Court for sentence and this is in substance what the learned Magistrate purported to do. Having heard the case to its conclusion it was in any opinion his duty himself to deal with the appellant according to law. The power given to a Magistrate's Court by the proviso to Section 85 of the Courts Ordinance, 1948, must be exercised, if it is exercised at all, before the Magistrate has come to a conclusion upon the guilt or otherwise of the accused. It must be remembered that in a summary trial the Court has to come to a conclusion at the close of the case for the prosecution as to whether or not the case has been made out which would warrant a conviction. In my opinion, therefore, it is improper for a Magistrate to exercise the power of transfer once he has called upon the accused for his defence. It has been held that a Magistrate must have before him some material upon which to come to a conclusion that the case is one proper to be transferred to a Sessions Court (see *Public Prosecutor v. Viran*[1]); but in the great majority of cases it should be apparent to a Magistrate whether or not the case is one which he could adequately deal with if a conviction resulted by the time he has heard the main story of the prosecution which will usually be contained in the complainant's evidence.

In the present case the learned Magistrate actually recorded a specific finding of guilt before making the transfer and in my opinion this was wrong.

As regards the so-called trial in the Sessions Court, the appellant had already been tried by the Magistrate and although the learned Magistrate had not actually recorded a conviction as such his recording of a finding of guilt in my opinion precluded the Sessions Court from trying him a second time. Whilst the circumstances did not come within the strict wording of Section 294 of the Criminal Procedure Code because the learned Magistrate had not actually recorded a conviction the omission of the learned Magistrate to do so was in itself an irregularity, because he had found the appellant guilty. The mere omission of the learned Magistrate to convict could not in my view give the Sessions Court jurisdiction to try the appellant over again.

The learned Deputy Public Prosecutor who appeared on the appeal conceded at the outset that the trial before the Sessions Court was irregular, and therefore for the reasons above given I declared that the trial before the Sessions Court was a nullity and held that the learned Magistrate having upon the facts